

ST 96-19

Tax Type:

SALES TAX

Issue:

Wholesale v. Retail Sales

Audit Methodologies and/or Other Computational Issues

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE

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STATE OF ILLINOIS

)

VS.

) NTL

)

) Gary Stutland

) Administrative Law Judge

TAXPAYER

)

RECOMMENDATION FOR DISPOSITION

Appearance: ATTORNEY, on behalf of the taxpayer, TAXPAYER

Synopsis:

On May 27, 1994, the Illinois Department of Revenue (hereinafter referred to as the "Department") issued to the taxpayer, TAXPAYER (hereinafter referred to as "TAXPAYER" or the "Taxpayer"), Notice of Tax Liability No. XXXXX. The Notice of Tax Liability set forth Retailers' Occupation and other related taxes due of \$8,593.00, penalty of \$859.00 and interest of \$2,148.00. Upon receipt of the notice the taxpayer timely filed its protest and request a hearing.

A hearing was held on December 7, 1994. The issue presented for review is whether the sales upon which the taxpayer self-assessed Use Tax were sales at retail upon which the taxpayer is liable to the State for Retailers' Occupation Tax and related taxes.

Upon consideration of all of the evidence, it is recommended that the Notice of Tax Liability be upheld in its entirety.

Findings Of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns. Dept. Ex. No. 1, 2, 3; Tr. pp. 5-6
2. TAXPAYER is a hardware store, owned by OWNER, making retail sales. Tr. pp. 14-19, 24, 25
3. The taxpayer's business was audited by Department auditor Caroline Ashbury. The audit covered the period of January 1, 1991, thru November 30, 1993. Dept. Ex. No. 1, 2, 3; Tr. pp. 5-7
4. In conducting the audit the auditor interviewed the taxpayer's controller, CONTROLLER. The auditor also examined the taxpayer's books and records which consisted of purchase invoices, sales invoices, sales tax returns, check stubs, cancelled checks, bank statements, and a trial balance. Tr. pp. 13-18, 23
5. Purchase invoices were examined for a three month test check period of April, 1991, January, 1992, and July, 1993. Tr. p. 14
6. In conducting its business affairs the taxpayer made over-the-counter sales to various building contractors, and also transferred certain other tangible personal property to a real estate management company, COMPANY (hereinafter referred to as "COMPANY" or "COMPANY"), a separate and distinct business entity, also owned by OWNER. Tr. p. 25
7. The taxpayer reported and remitted sales tax on sales of \$17,936.00, in 1991, \$574.00, in 1992 and \$10,995.00, in 1993. However, reported sales did not include any transactions between the taxpayer and COMPANY. Tr. pp. 18, 19
8. The taxpayer also reported and self assessed use tax on purchases of \$204,467, in 1991, \$193,701, in 1992 and \$52,803, in 1993. Included in the taxpayer's calculations for use tax purposes were those items that had been transferred to COMPANY. Tr. p. 20
9. After the tangible personal property was transferred to COMPANY, the taxpayer made a bookkeeping entry showing the transaction as an account receivable. When the dollar amount of the receivable

reached approximately \$1,500.00, the taxpayer would receive a reimbursement check from COMPANY. Tr.p.

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10. The tax assessment was based upon the auditor's findings that the taxpayer had improperly self-assessed use tax on those purchases that were subsequently transferred to COMPANY. The auditor concluded that these transfers were in fact retail sales. The tax due was determined to be the difference between the sales tax and use tax rates on those items. Dept. Ex. No. 4

Conclusions Of Law:

On examination of the record established, this taxpayer has failed to demonstrate by the presentation of testimony or through exhibits or argument, evidence sufficient to overcome the Department's *prima facie* case of tax liability under the assessment in question. Accordingly, by such failure, and under the reasoning given below, the determination by the Department that TAXPAYER is subject to the imposition of the Retailers' Occupation Tax and other related taxes must stand as a matter of law. In support thereof, the following conclusions are made:

Section 4 of the Retailers' Occupation Tax Act states, in pertinent part, as follows:

As soon as practical after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information, which return so corrected by the Department shall be *prima facie* correct and shall be *prima facie* evidence of the correctness of the amount of tax due, as shown herein.

Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be *prima facie* proof of the correctness of the amount of tax due, as shown therein.

35 ILCS 120/4 (1993)

It is well settled law in Illinois that the Department's correction of returns establishes its *prima facie* case for the correctness of its assessment. Masini v. Department of Revenue, 60 Ill. App.3d 11 (1st Dist. 1978); Fillichio v. Department of Revenue, 15 Ill.2d 327 (1958). Additionally, there is no statutory requirement

that the Department substantiate, at a hearing, the basis for the corrected return in order to sustain the *prima facie* correctness of the assessment. A.R. Barnes v. Department of Revenue, 173 Ill. App.3d 826 (1st Dist. 1988); Masini v. Department of Revenue, *supra*.

In this instance, the Department's corrected returns were admitted into evidence. Therefore, as a matter of law, the *prima facie* correctness of the amount of tax, penalties and interest due was established.

Taxpayer contends, however, that the tangible personal property it transferred to COMPANY were subject to its own self-assessed use tax, and that, in essence, the transfers were not sales. The Department, to the contrary, avers that the transfers from the taxpayer, a retailer, to COMPANY, a separate and distinct business entity, were retail sales, subject to the sales tax. I concur with the Department.

Illinois statute defines the word "use", in pertinent part, as follows

the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of such property in any form as tangible personal property in the regular course of business to the extent that such property is not first subject to a use for which it was purchased, and does not include the use of such property by its owner for demonstration purposes... .

35 **ILCS** 105/2

The use tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 35 **ILCS** 105/3. In Modern Dairy Co. v. Department of Revenue, 413 Ill. 55 (1952), the Court stated that it was reasonable to assume that the legislature intended the term "use" to include any employment of a thing which took it off the retail market so that it was no longer an object of tax on the privilege of selling it at retail.

The Retailers' Occupation Tax Act defines "sales at retail" as:

any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased for valuable consideration... .

35 **ILCS** 120/1

The Use Tax Act similarly defines "sale at retail" and further defines "retailer" to mean "every person engaged in the business of making sales at retail as defined in this Section." 35 **ILCS** 105/2

Once the Department has introduced into evidence its corrected return the burden shifts to the taxpayer to overcome the *prima facie* correctness of the amount of the tax due by producing competent evidence, identified with its books and records, that the transactions were not subject to the retailers' occupation tax. A.R. Barnes and Co. v. Department of Revenue, *supra*. The taxpayer may not prevail by merely saying that its own return is correct. Simply questioning the Department's return or denying its accuracy does not shift the burden to the Department. Copilevitz v. Department of Revenue, 41 Ill.2d 154 (1968); Masini v. Department of Revenue, *supra*; A.R. Barnes, & Co. v. Department of Revenue, *supra*.

Although the taxpayer contends, and reported to the Department on its Retailers' Occupation Tax returns, that it converted the property at issue for its own use, thus making self-assessment of the Use Tax correct, it produced no evidence as to when, where or how it employed the goods for its own use. In fact, the evidence of record verifies that the purpose of taxpayer's purchases of hardware, *etc.*, was either for sales to contractors or to COMPANY which paid taxpayer for the goods, albeit sporadically.

The taxpayer called no witnesses, other than the auditor. The auditor testified to the reasonable steps taken in correcting the return. Based upon the auditor's testimony and the documentary evidence as presented by the Department, I conclude that the taxpayer is in the business of making retail sales of hardware goods, wares and merchandise. The taxpayer first purchased the merchandise from its supplier for the purpose of reselling to others. The taxpayer then sold the goods to his over-the-counter customers, or transferred them to COMPANY. COMPANY used the goods in its business operation, remitting a payment to the taxpayer. The end user in each instance was either the over-the-counter customer or COMPANY. The taxpayer never took the goods off the retail market by converting the goods to its own "use".

The fact that OWNER owns both companies does not change these determinations. The taxpayer was under a legal obligation to come forward with evidence that rebutted the Department's determination that its transfers of tangible personal property to COMPANY were not sales but, rather, were for taxpayer's own use. The taxpayer failed to do so.

This taxpayer sought to avoid the collection and payment of Retailers' Occupation Tax on its transfers to COMPANY. Thus, it is my recommendation that Notice of Tax Liability No. XXXXX be finalized as issued.

Date entered

Gary Stutland
Administrative Law Judge